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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, WILLIAM A. HANSON, MADELYN LAW, RALPH F. McELROY, ALAN E. MOSS, FRANK J. SHEALEY, PHYLLIS A. WALTER, MARGARET-MARY CUMMISKEY, and CORNELIUS A. CUMMISKEY,

Appellants,

—v.—

JOAN DiCENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island,

Appellants,

—v.—

JOAN DiCENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING, and MARIE FRIEDEL,

Appellees.

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

BRIEF OF APPELLEES

LEO PFEFFER
15 East 84th Street
New York, N. Y. 10028

MILTON STANZLER
626 Industrial Bank Building
Providence, R. I. 02903

HAROLD E. ADAMS, JR.
WILLIAM J. SHEEHAN
ALLAN M. SHINE
RICHARD W. ZACKS

Attorneys for Appellees

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Question Presented

Does a statute subsidizing the operations of parochial schools violate the First Amendment to the Federal Constitution notwithstanding the fact that the subsidy is earmarked to supplement the salaries of teachers teaching only subjects taught in public schools and who promise not to teach a course in religion while the salary supplement payments are in effect?[1]

Statement of the Case

Responding to pleas by Catholic parochial school authorities concerning the financial plight of their educational system, the Rhode Island legislature enacted the Rhode Island Non-Public School Salary Supplements Act. (R. I. General Laws, Title 16, Chapter 51.) The statute as originally introduced (J.A. 178-182) would have encompassed all non-public schools but was amended before it was enacted. Appellees contend that the purpose of the amendment was to limit its coverage to the parochial school system, but whether or not this was the purpose it was indeed its effect for it is conceded that none but teachers in Catholic parochial schools have qualified under the statute as enacted.[2]

Individual citizens and taxpayers of Rhode Island brought suit in the United States District Court for the District of Rhode Island challenging the constitutionality

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[1] It is to be noted that the teachers are not required to promise not to interject religion in the courses they do teach. As will be indicated below (p. 34) the Synodal law of the Diocese, adherence to which is mandatory on all teachers (J.A. 72), in fact requires them to inject religion in all their teaching.

[2] The point is discussed further *infra* pp. 15-16.

of the statute under the Establishment and Free Exercise Clauses of the First Amendment. A number of teachers in the parochial school system and parents of children attending those schools were permitted to intervene as defendants and their counsel participated actively in the proceedings.

After a trial in which substantial documentary and oral evidence was introduced, the District Court ruled unanimously that the challenged statute was unconstitutional under the Establishment Clause. Two members of the Court held it unconstitutional under both the purpose-effect test as formulated in *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) and applied in *Board of Education* v. *Allen,* 392 U.S. 236 (1968) and the entanglement test as formulated and applied in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970). The third member held the law to be unconstitutional only under the latter test.

Summary of Argument

A number of tests have been suggested for the application of the Establishment Clause to governmental financing of religious schools. These include (1) the no-subsidy test announced in *Everson* v. *Board of Education,* 330 U.S. 1 (1947); (2) the purpose-effect test of *Schempp-Allen;* (3) the entanglement test of *Walz;* (4) the secular means and end test suggested by Mr. Justice Brennan in his concurring opinions in *Allen* and *Walz;* (5) the test of time and place suggested in the opinions of the Court and of Mr. Justice Brennan in *Walz;* and (6) the balancing test suggested in the Court's opinion in *Allen.*

The no-subsidy test of *Everson* has never been expressly or impliedly abandoned by this Court; its authority remains unimpaired by any subsequent decision of the Court. Under that test the challenged statute is unconstitutional since in substance if not in form it constitutes a direct subsidy to churches for the operation of their religious schools, and it is constitutionally immaterial that the subsidy is earmarked for payment of salaries of teachers of so-called secular subjects.

In applying the purpose-effect test, a statement of purpose, at least in respect to state statutes, does not foreclose this Court from examining into the actual legislative purpose. In such examination, the Court may and should consider the legislative history of the statute and the historical circumstances of its adoption. This history establishes conclusively that the purpose of the challenged statute was to insure the continued operations of parochial schools. Since these schools teach and practice religion, the purpose of the statute is necessarily to advance religion.

Irrespective of purpose, a primary effect of the statute is to advance religion. This is clearly established by the record in this case—a record absent in *Allen*. That record shows that religion is so much part of the purpose, life and meaning of the parochial school system that governmental financing of it in whole or in part necessarily has the effect of advancing religion.

It is impossible to uphold the validity of the challenged statute under the entanglement test. Unless the state officials rely exclusively on the promise of the teachers not to teach religious subjects, and upon their constitutional but unpromised obligation not to introduce religion into the subjects they do teach—a reliance which would con-

stitute an abandonment of official responsibility—the statute requires that deep involvement and continued surveillance of religious affairs which the *Walz* decision holds impermissible under the Establishment Clause.

Under the secular means test, there is no evidence or reason to believe that the secular end sought to be advanced by the state cannot be effectuated without use of what the District Court called the "religious enterprise" of the parochial school system. The evidence establishes and the District Court found that the statute will impose increasing financial burdens on the state's educational budget, burdens which in time can exceed or at least not be less than involved in expanding the public school system to care for all children who wish to attend. In any event, the fact that secular means may be more expensive than religious ones does not justify disregard of the Establishment Clause.

Unlike tax exemption for churches, which goes back to the founding of the Republic and prevails in the Federal Government and in every state of the Union, subsidization of the salaries of parochial school teachers is a recent innovation. With the exception of sharply divided decisions in two recent cases, it has been held unconstitutional by every court which passed on the question. Other devices to subsidize the operations of parochial schools have uniformly been held unconstitutional by the state courts.

While under the balancing test the Court may consider the value of nonpublic schools in providing a secular education to children, the Court should also consider the negative effects of such schools. Paramount among these is the effect upon racial segregation in our public school

system. Statistical and other judicially noticeable evidence shows that nonpublic schools, including parochial schools, are increasingly being utilized by parents who seek an escape for their children from the influx of children of minority races into the public schools.

ARGUMENT

I.

The *Everson* test: subsidization.

In *Everson,* the Court said (and with this, of course, the minority concurred): "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." (330 U.S. at 17.) It stated further that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." This was hardly a radical concept; financial support of religion was always recognized as a form and perhaps the most obvious form of establishment.[3] It is because of this principle that practically every state in the Union, either by express constitutional provision,

[3] In *Flast* v. *Cohen,* 392 U.S. 83, 98 (1968) the Court speaks of "such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects." In *Walz,* the Court stated that "The grant of tax exemption is not sponsorship since the government does not transfer part of its revenue to churches • • •." 90 S. Ct. at 1415.

statute or judicial decision, has forbidden use of tax-raised funds to finance the operations of sectarian schools.[4]

Nevertheless, appellants appear to assume that either the Court did not mean what it said in *Everson* or that what it said has been so impaired by subsequent decisions that it is no longer viable. This, we submit, is erroneous. Nothing this Court has said or held since *Everson* impairs the validity of its basic principle or indicates any intent to abandon or modify the test therein stated.

The argument supporting this assertion has been set forth in the brief of the appellants in *Tilton* v. *Richardson*, No. 153, October Term, 1970, and of the American Association of School Administrators and other public education agencies and organizations as *amici curiae* in *Lemon* v. *Kurtzman*, No. 89, October Term, 1970. To avoid unnecessary repetition we incorporate herein and respectfully refer the Court to pp. 15-27 of the former brief and pp. 14-23 of the latter brief.[5] Here we note only that it is of course within the power of this Court to repudiate the *Everson* principle, but if that is the Court's intent it should do so in clear and unambiguous language. We repeat here only our quotation from Chief Justice Marshall's opinion in *United States* v. *Burr*, 4 Cranch 470, 482 (1807):

> [A]n opinion which is to overrule all former precedents and to establish a principle never before recog-

[4] See *infra* pp. 50-51. Even in *Horace Mann League* v. *Board of Public Works*, 242 Md. 645, cert. den., appeal dismissed, 385 U.S. 97 (1966), the Maryland court's exclusive reliance on the First Amendment was based on the fact that only colleges and not elementary and secondary schools were involved.

[5] Copies of these briefs have been served upon opposing counsel.

> nized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. • • • General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect • • •.

If we are correct in our assertion that *Everson* is still the law of the land, the present statute cannot stand. To adjudge the statute as providing aid to some teachers but not subsidizing the operations of the schools they teach in would be elevating form over substance and substituting fiction for actuality. That the purpose and effect of the statute is to subsidize the parochial schools is clear from its legislative history, express statements therein, the operation of the statute as revealed by the record at the trial, the arguments of counsel, and the opinions of the District Court, both majority and concurring.

The legislative history of the statute shows (as the intervenor appellants concede)[6] that it was enacted not in response to the financial needs of teachers but to the "plight of nonpublic schools" (J.A. 65-66). The statute speaks of the role of schools in educating Rhode Island youth, of their difficulty in maintaining traditional quality due to rising costs and of the need "to assist nonpublic schools" (J.A. 183). The expressed purpose of the statute is to provide funds to enable nonpublic schools to compete with public schools in purchasing the services of qualified teachers. This is no less a subsidization of the parochial schools than grants of Federal funds to enable domestic industries to compete with foreign imports is a subsidization of those industries.

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[6] Brief, p. 4.

The parochial school authorities were in no doubt as to who was the real beneficiary of the statute, as appears from the testimony of Father Edward W. K. Mullen, Superintendent of Schools for the Diocese of Providence:

> Judge Coffin: Did you say earlier that this bill, if it be held invalid, that you would not be able to offer more than $6,000 as a starting salary?
>
> The Witness: Yes.
>
> Judge Coffin: But in 1969 and 1970 you did offer $6,000. Is this including funds that the bill provided for?
>
> The Witness: No, we offered $6,000. We contracted for it certainly hoping that *we would get 15 per cent from the state, but we are committed to the $6,000 whether or not we get it.*
>
> Mr. Collins: We may have some further evidence on that, Your Honors, that might do violence to that answer.[7]
>
> Judge Pettine: The maximum of six thousand is what you can offer if the court should find it unconstitutional?
>
> The Witness: Yes.
>
> Mr. Collins: That is for next year, Your Honor. For next year.
>
> Judge Pettine: What are they paying this year?
>
> The Witness: They are paying six thousand. Could I explain that a little, please?
>
> Judge Pettine: Yes.
>
> The Witness: Well, we offered $6,000 this year, and we hoped that the bill would pass, although we made

[7] No further evidence was offered that did "violence to that answer."

commitments to the $6,000 bill and it had not passed, so we are committed at $6,000 this year. If the Court finds the bill unconstitutional and we know that *we will have to pay the entire committed salary for the future,* then we won't be able to offer more than $6,000, because we will in addition to the problem there, the great majority of the parishes are going to have to hire at least one more lay teacher next year than they have this year, and some parishes two or three.

Judge Pettine: That other $6,000 that is now being paid, Father, is the parish paid $5100 of that?

The Witness: Well, pending the decisions of this Court.

Judge Pettine: I'm just wondering where the other $900 is going to come from.

The Witness: *Well, it will have to come from the parishes.*

Judge Coffin: Assume the bill is held constitutional, then the parish would pay $5100 and the subsidy will amount to nine?

The Witness: Yes, sir. (J.A. 91-92. Emphasis added. See also J.A. 23.)

Counsel for the State of Rhode Island speaks of "legislation designed to afford aid to the non-public schools" (Brief, p. 9), and of "the legislature's efforts to save its non-public schools." (*Ibid.,* p. 10.) Counsel for the intervenor-appellants stresses the "plight of the nonpublic schools" and of their "financial problems" as the reasons for the enactment of the statute (Brief, p. 4). Their defense of the statute is based on the contention that "government can constitutionally subsidize the secular educational functions performed by church-related schools." (*Ibid.,* p. 7.)

The majority of the court below bases its decision on the premise that "the Establishment Clause values can be preserved only by denial of direct subsidies to parochial schools" (J.A. 47). The concurring opinion speaks of the "support of the secular educational processes of sectarian schools" (J.A. 50).

These instances can be multiplied manifold. They all point to the same conclusion: that the challenged statute seeks to subsidize the operations of parochial schools rather than provide benefits to teachers as individuals. This conclusion is fortified by the fact that the statute determines eligibility not on the basis of the needs of the teacher but of the school. Thus it conditions eligibility on the teacher's receipt of "a salary which, including the salary supplement, meets the minimum salary standards for public schools." If the beneficiary of the statute were the teacher rather than the school, it would seem that on the contrary the teachers most deserving of state aid would be those whose salaries do not reach the public school minimum. We know of no other statute under which individuals are punished by denial of state benefits by reason of the niggardliness of their employers.[8]

None of the courts which have considered the validity, either under Federal or state constitutions, of statutes similar to the one challenged herein have viewed them as anything but a subsidization of the operations of the schools.

---

[8] The District Court suggests that "the restriction of aid to schools whose per pupil expenditures does not exceed that of the public schools " * * * serves the legitimate secular purpose of saving state funds by eliminating schools which can afford well qualified teachers" (J.A. 40). This may be so, but it remains a case of penalizing the teacher for the niggardliness of the school in fixing teachers' salaries.

Opinion of the Justices, 261 A.2d 58 (Me. 1970); *Opinion of the Justices,* —— Mass. ——, May 11, 1970; *Johnson* v. *Sanders,* —— F. Supp. ——, U.S. District Court for the District of Connecticut, October 15, 1970; *Seegers* v. *Parker,* —— La. ——, Supreme Court of Louisiana, October 20, 1970. Even the two courts which did uphold the constitutionality of such statutes, *Lemon* v. *Kurtzman,* 310 F. Supp. 35 (1969), probable jurisdiction noted, 397 U.S. 1034 (1970) and *Matter of Legislature's Request,* —— Mich. ——, Michigan Supreme Court, October 5, 1970, did not base their decisions on the assumption that the statutory subsidy was to the teachers rather than to the schools.

If, as we contend, the subsidy is to the school and not to the teachers, we submit that for the reasons stated in the decision of the court below (J.A. 40-41) and discussed further below (pp. 21-38), the fact that the statute earmarks the subsidy for payment of salaries of teachers of secular subjects does not immunize it from invalidation under the *Everson* principle. Constitutional barriers cannot be evaded by sophisticated bookkeeping procedures.

II.

Schempp-Allen: purpose and effect.

The defense of the challenged statute herein (as in *Lemon* and *Tilton*) rests almost exclusively on the purpose-effect test announced in *Schempp.*[9] The majority of the District Court applied this test and reached a contrary result, but the appellants contend that it misunderstood or misapplied the test. We submit that if the test requires validation of statutes such as the present one, then it is not a test for the application of the Establishment Clause but for its substantial nullification. It is our position that whether viewed from the point of purpose or effect, the statute is unconstitutional.

A. *Purpose*

Initially, we urge that the Federal courts are not foreclosed from themselves determining the actual purpose of a state statute by reason of the statement of purpose contained therein. Whatever may be the rule in the case of a Congressional statement of purpose, in view of the respect due to a coordinate branch of government, to hold that a statement of secular purpose in a state statute forecloses further inquiry would render meaningless the requirement that the legislative purpose be in fact secular; a ritual incantation would suffice to exorcise the spectre of unconstitutionality.

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[9] Interestingly, the test has been applied in three cases, *Schempp, Allen* and *Epperson* v. *Arkansas*, 393 U.S. 97, 107 (1968). In two of the three cases (*Schempp and Epperson*) it was used not to uphold but to strike down laws aiding religious teaching or practices.

Prefacing an enactment for financial support of religious teaching with a statement of secular purpose is hardly new; it goes back to what may be deemed the progenitor of the instant statute and all similar ones—the Virginia Bill Establishing a Provision for Teachers of the Christian Religion, the defeat of which, as the Court recognized in *Everson,* was part of the legislative history of the Establishment and Free Exercise Clauses. The opening paragraph of that Bill read:

> Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians;
>
> *Be it therefore enacted by the General Assembly,* • • • (330 U.S. at 72).

This recitation of exclusively secular purposes did not prevent Madison from calling the Bill what it was, a Religious Assessment, and hence a law respecting an establishment of religion and prohibiting its free exercise.

The duty of the Court to search out the actual facts was recognized in *Evans* v. *Abney,* 90 S. Ct. 628 (1970), wherein the Court said (at 633):

> No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated.

In searching out the true purpose of a statute and in judging whether it is secular, the courts must consider its legislative history. This was stated by the Court in *McGowan* v. *Maryland,* 366 U.S. 420, 453 (1961):

> • • • We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, *in conjunction with its legislative history,* or in its operative effect—is to use the State's coercive power to aid religion. (Emphasis added.)

We submit that the legislative history of the statute herein shows clearly that it had only one purpose, and that was to relieve the financial plight of the state's parochial school system by providing financial support for its operations (J.A. 66). As we will show shortly, the salary-supplements mechanism is but one in a great variety of devices being employed to appropriate tax-raised funds for the support of sectarian schools in the face of the recognized unconstitutionality of a direct grant of public funds to such schools.

There is evidence to support a conclusion that the statute was tailored to apply only to the parochial schools. As

the District Court noted, the financial crisis upon which the legislature based its action "is largely confined to Rhode Island's Catholic schools" (J.A. 32; 60-62). These schools enroll approximately 95% of the children attending nonpublic schools (*ibid.*), but the legislature nevertheless amended the measure so as effectively to exclude from its coverage, at least up to the time of trial, all but Catholic nonpublic schools (J.A. 98-100). But whatever the case may be, it is hardly open to question that the parochial schools were the primary beneficiaries of the act and were intended to be so.[10]

In the search for "fact and truth" (*Evans* v. *Abney, supra*), the courts are not limited to the immediate legislative history in the narrow sense of that term, but may and should consider the historical context of the statute. Mr. Justice Brennan pointed this out in his opinion in *Adickes* v. *S. H. Kress & Co.*, 90 S. Ct. 1598, 1623 (1970):

> A legislative or constitutional provision need not be considered in isolation, but may be examined "in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" *Reitman* v. *Mulkey*, 387 U.S. 369, at 373 (1967).

The application of this principle to the Establishment Clause was exemplified in *Epperson* where the Court invalidated under that Clause a state statute forbidding the teaching of evolution in the public schools. The statute itself made no mention of religion or the Bible. Neverthe-

[10] Intervenor-appellants concede as much (see Brief, p. 41, fn. 36), although they naturally designate the beneficiaries as the teachers in those schools rather than the schools themselves.

less, the Court found that the statute came out of the same historical context that spawned the Tennessee "monkey law" which gave rise to the famous Scopes trial and found that the actual purpose of the law was to protect fundamentalist sectarian doctrine from impairment by public school teachers.

Mr. Justice Brennan's resort to "historical context" in *Adickes* and the Court's resort to it in *Reitman* as well as in the decisions cited by the Court in *Reitman* to support its use of historical context, indicate that the guaranty of equality in the Fourteenth Amendment would be little more than a parchment barrier were the Court to close its eyes to history. That history is in large measure a chronicle of efforts to evade the mandate of the Amendment, a sort of historic chess game in which the moves are limited only by the ingenuity of lawyers in devising such gambits as "grandfather clauses," white primaries, gerrymandering, literacy tests, poll taxes, zoning laws, racial restrictive covenants, "separate but equal," tuition grants to private "academies," lease of municipal facilities to private corporations, etc., etc.[11]

The history of efforts to obtain tax-raised funds for sectarian schools in the face of Federal and state constitu-

[11] To take the area of voting as an illustration, the chess game would go something like this:

White	*Black*
Grandfather clause	Guinn v. U. S., check
white primary	Smith v. Allwright, check
"Jaybird Party"	Terry v. Adams, check
gerrymandering	Gomillion v. Lightfoot, check
poll tax	Harper v. Virginia Board of Elections, check

At the present writing, checkmate does not yet appear to be in sight.

tional barriers is remarkably similar. Perhaps the earliest experiment was the so-called Faribault plan, originating in Faribault, Minn.[12] There, the parochial schools experiencing a financial crisis (not unlike that which now faces the Rhode Island Catholic school system and which has been faced and been overcome by all Catholic parochial school systems since their establishment towards the middle of the last century) were incorporated into the public school system enabling them to receive tax funds without relinquishing ecclesiastical control or changing the character of their operations. The Faribault plan spread rapidly over most of the midwest, but with one exception[13] has been held unconstitutional by every court to which it has been presented.[14]

Next came free textbooks,[15] followed by bus transportation.[16] These, however, provided only tangential benefits to parochial schools, although together with free lunches and similar welfare services for children attending nonpublic schools, they represented the limits of the demands

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[12] See, L. Pfeffer, *Church, State and Freedom*, 538 (1967).

[13] *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348 (1940).

[14] E.g., *Zellers* v. *Huff*, 55 N.M. 501 (1951); *Berghorn* v. *Reorganized School District No. 8*, 364 Mo. 121 (1954). The earlier cases are cited and discussed in *Note*, "Catholic Schools and Public Money," 50 *Yale L.J.* 917 (1941).

[15] Upheld in *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 (1930) and *Allen*, but invalidated in *Smith* v. *Donahue*, 202 App. Div. (N.Y.) 656 (1922); *Zellers* v. *Huff*, *supra*, and *Dickman* v. *Oregon School District*, 366 P.2d 533, *cert. denied*, 371 U.S. 823 (1962).

[16] Upheld in *Everson* and a number of state cases; invalidated in other state cases. See L. Pfeffer, *Church, State and Freedom*, 562-563, 570-571 (1967).

of parochial school authorities up to the late fifties.[17] The sixties witnessed a host of multifarious new demands upon state legislatures and sympathetic responses thereto by the legislatures. These included grants for construction,[18] auxiliary services,[19] shared time or dual enrollment,[20] tuition,[21] purchase of secular teaching services and salary supplements,[22] record keeping expenses,[23] and assignment of public school teachers for service in sectarian schools,[24] etc., etc.

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[17] See statement of Cardinal Spellman that the Church does not "expect public funds to pay for the construction and repair of parochial school buildings or for the support of teachers, or for other maintenance costs," since that would be unconstitutional, but only for "auxiliary services" of transportation, non-religious textbooks and health aids. New York *Times*, August 6, 1949. To the same effect, see N. G. McCluskey, *Catholic Viewpoint on Education*, p. 168 (1959).

[18] Invalidated in *Horace Mann League* v. *Board of Public Works, supra.*

[19] Challenged in *Wolman* v. *Rhodes*, Court of Common Pleas, Franklin County, Ohio, May 10, 1968; *O'Hare* v. *Detroit Board of Education*, United States District Court for the Eastern District of Michigan, Civ. No. 27899.

[20] Invalidated in *Special District* v. *Wheeler*, 408 S.W.2d 60 (Mo. Supreme Court, 1966).

[21] Invalidated in *Opinion of the Justices*, —— Mass. ——, June 4, 1970; *Swart* v. *South Burlington*, 122 Vt. 177, cert. denied, 366 U.S. 925 (1961).

[22] Invalidated in *Opinion of the Justices*, 261 A.2d 58 (Me., 1970); *Opinion of the Justices*, —— Mass. —— (May 11, 1970); *DiCenso* v. *Robinson*, 316 F. Supp. 112 (1970); *Johnson* v. *Sanders*, U. S. District Court for the District of Connecticut, October 15, 1970; *Seegers* v. *Parker*, —— La. —— (La. Supreme Court, October 20, 1970). Upheld in *Lemon* v. *Kurtzman*, 310 F. Supp. 35 (1969) and *Matter of Legislature's Request*, —— Mich. —— (October 5, 1970).

[23] Challenged in *Committee for Public Education* v. *Rockefeller*, U.S.D.C. for the Southern District of New York, 70 Civ. 3251.

[24] Invalidated in *State ex rel. Chambers* v. *School District No. 10*, —— Mont. —— (July 28, 1970). Challenged in *Fisher* v. *School District No. 1*, Clackamas, Oregon, Circuit Court, January 14, 1970; *Citizens to Advance Public Education* v. *Porter*, Ingham County, Michigan, Circuit Court, December 18, 1969.

This history of efforts to obtain tax raised funds for the support of sectarian schools is paralleled in Rhode Island. First came bus transportation (R. I. Gen. Laws 16-21-2); in 1963 came free textbooks (Laws of 1963, ch. 12; R. I. Gen. Laws 16-23-2); the Salary Supplements Statute followed in 1969. It may safely be assumed that no matter how this appeal is decided, the Salary Supplement Law will not be the last chapter in the state's history of efforts to obtain financing of parochial school operations. (See, J.A. 41.)

In analogizing the legislative efforts to obtain public funds for the support of sectarian schools to efforts to maintain racial discrimination and segregation, we have no intention of impugning the motives of the numerous state legislatures which have enacted funding laws. We have no doubt that they believed deeply that such funding was necessary for the preservation of the nation's religious schools, and that such preservation was in the national interest and in the interest of the people of the respective states.

Nor do we have any intention of impugning in the slightest the motives of those who have pressed for the enactment of these laws. Anyone having cursory familiarity with the history of America's parochial school system cannot be unaware of the courage of the Catholic church leaders and the Catholic community in resisting popular and legislative efforts to destroy it;[25] nor of the heavy financial sacrifices voluntarily made by them and which

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[25] See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). The law invalidated in that case was initiated at a time when Ku Klux Klan elements were particularly active and influential in the state. See, G. Myers, *History of Bigotry in the United States*, 293 (1943).

continue to be made by them for more than a century in order to sustain the religious schools. And it should also be remembered that the establishment of the parochial school system as a place of refuge for Catholic children was practically made necessary by the evangelical zeal and anti-Catholic bigotry of many public school officials and teachers.[26]

Nevertheless, if, as the intervenor-appellants assert (Brief, p. 41), illicit motives do not render unconstitutional a statute otherwise constitutional, neither do noble motives make constitutional a statute otherwise unconstitutional. The First Amendment is no less part of our Constitution than is the Fourteenth, and if the historical context of laws challenged as violative of the latter amendment is relevant evidence in determining their purpose, the same is no less true in respect to laws challenged under the former. This evidence, we submit, establishes conclusively that the purpose of the Rhode Island Salary Supplements Law is to finance the operations of parochial schools. A law so purposed, we submit further, violates the First Amendment no matter what test is used.

B. *Effect*

Allen, upon which the appellants place practically their sole reliance, unlike the present case did not involve subsidization,[27] but in addition did not present a record upon

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[26] See L. Pfeffer, *Church, State and Freedom,* 436-444 (1967); M. Williams, *The Shadow of the Pope, passim* (1932).

[27] This was noted by the United States Court of Appeals for the Sixth Circuit in *Protestants and Other Americans United* v. *United States,* decided December 16, 1970:

> *Allen* followed *Everson* v. *Board of Educ.,* 330 U.S. 1 (1947), which upheld the constitutionality of a state statute

which the Court could find a primary effect that advanced religion. The present case does present such a record and it was on that record that the District Court determined the Rhode Island statute to be unconstitutional even under the purpose-effect test. The following analysis of the record shows that it fully supports the Court's determination. (A similar factual analysis was used by the courts in *Zellers* v. *Huff, supra; Berghorn* v. *Reorganized School District No. 8, supra,* and the many other cases holding unconstitutional the use of public funds to pay the salaries of teachers in parochial schools.)

1. *The Background of the Parochial School System*[28]

The origin of the Catholic parochial school system in the United States is found in the canon adopted by the First Provincial Council of Baltimore in 1829, which stated:

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providing for the free busing of school children to public as well as parochial schools.

In both of these cases the secular aid was furnished directly to the school children, who ought to be entitled to such aid irrespective of the schools they attended, whether public or parochial, the same as they are entitled to other public services such as police and fire protection.

Title II of the [Elementary and Secondary Education] Act in question, however, goes one step further. It lends library materials, not to the children, but directly to the parochial schools for use by the children and the teachers. * * *

[28] Technically, this is not part of the record but we believe it is judicially noticeable. Mr. Justice Jackson noted it in his dissenting opinion in *Everson*. So, too, did the Supreme Court of Montana in *State ex rel. Chambers* v. *School District No. 10, supra.* Moreover, the intervenor-appellants refer in their Brief (p. 4, footnote 3) to the nationwide crisis of religious schools, although there is nothing in the Record to substantiate it, presumably because it is judicially noticeable. If the financial problems of the Rhode Island parochial schools "are only a microcosm of a nationwide crisis," it is reasonable to assume that the Rhode Island parochial schools are only a microcosm of a nationwide system.

> We judge it absolutely necessary that schools should be established in which the young may be taught the principles of faith and morality, while being instructed in letters.[29]

However, it was the Third Plenary Council held in 1884 that firmly established the parochial school system in enacting the following statute:

> 1. Near each church, where it does not yet exist, a parochial school is to be erected within two years from the promulgation of this Council, and it is to be maintained *in perpetuum,* unless the bishop, on account of grave difficulties, judges that a postponement be allowed.[30]

This statute has never been rescinded or modified and the requirement that every Catholic parish church have a parochial school appended to it remains part of the canon law of the Church. As a result, the Catholic parochial school is today practically as pervasive in the United States as is the Catholic parish. What Justice Jackson said in his dissent in *Everson* is substantially true today notwithstanding the difficulties faced by the parochial school system both because of rising costs and the decline of religious orders. Justice Jackson said (330 U.S. at 24):

> I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to

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[29] J. A. Burns, *The Catholic School System in the United States,* p. 249 (1908).

[30] J. A. Burns, *The Growth and Development of the Catholic System in the United States,* p. 195 (1912).

> the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education for the young and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to the Church school is indistinguishable to me from rendering the same aid to the Church itself.

This was recognized by the Court in its statement in *Walz* (90 S. Ct. at 1412-1413) that religious groups "maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body would deny this is an affirmative if not dominant policy of church schools."

2. *The Structure of the Parochial School System in Rhode Island*

The parish school is as integrated into the Catholic Church system of Rhode Island as is the parish church, subject to the same philosophy, discipline and doctrine. The head of the system is the head of the Church, the Ordinary, or Bishop of Providence. His approval of the Handbook of School Regulations now in effect has "the force of synodal law in the diocese" (J.A. 191) and is "binding with respect to the administration and operation of the schools" (J.A. 72).

Direct responsibility for the supervision of the school system rests with the Diocesan School Board. The canon law of the diocese provides that "The Diocesan School Board * * * shall supervise the education, both spiritual *and secular,* in the parochial schools and diocesan high

schools" (J.A. 196).[31] The Board, however, "is the agency of the Ordinary [Bishop] for determining and formulating school policies. Its recommendations when approved by the Ordinary become mandatory for all schools • • •" (J.A. 196).

Immediate responsibility for the operation of the system as a whole rests with the Diocesan Superintendent of Schools. He is the "agent of the Ordinary," and it "is his office to transmit and to implement the educational policies of the Bishop and the School Board" (J.A. 197). The canon law of the Diocese provides that "The instructions of the Diocesan Superintendent of Schools must be faithfully and accurately observed at all times" (*ibid.*).[32]

Responsibility for the operation of each parochial school rests with the pastor of the parish church to which the school is appended. The Diocesan canon law provides that "The pastor shall have full charge of the parochial school under the Diocesan Board of Education and the Diocesan Superintendent of Schools" (J.A. 199). Parenthetically, it may be noted that herein lies a critical difference between parochial schools and church related colleges. The latter, while usually sponsored and controlled either by a diocese

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[31] The asterisks in the quotation indicate the omission of the words "with the Bishop presiding," which by stipulation Father Mullen, the Diocesan School Superintendent, would have testified is not in effect (J.A. 121). It is quite understandable that with his manifold duties and responsibilities the Bishop cannot personally preside at School Board meetings, but in all other respects the quotation is conceded to be accurate and effective.

[32] It was stipulated that Father Mullen, if called to the stand, would say "that that would be very nice but he has serious doubts about whether that is true" (J.A. 121). The canon law of the Diocese of Providence is not the only law that is not "faithfully and accurately observed at all times." Even the United States Constitution is occasionally, and in some respects widely, violated but it is still the law of the land.

or a religious order (though generally separately incorporated), are not part of or an auxiliary to any particular parish church.[33]

The pastor is *ex officio* the chief administrative officer of a parish school, although the immediate direction of the school and its instructional program is usually delegated to the sister principal of the religious order whose members constitute the instructional staff in whole or part (J.A. 199).[34] It is, however, the pastor who signs the contracts under which the teachers are engaged and, either himself interviews the applicants for teaching positions or delegates that responsibility to the principal (J.A. 75).

Because the operation, control and financing (J.A. 76) of the individual parochial school are the responsibility of the parish priest under the Diocesan Superintendent of Schools, School Board and Bishop, while the schools themselves are staffed largely by members of religious orders whose membership and operations are not limited to one diocese, some liaison mechanism is required. This is provided by a supervisor assigned by the religious order (also called community) which provides the teaching staff. The Diocesan Handbook of School Regulations states (J.A. 201-202):

> C. To the end that there may be no conflict in authority between the diocesan school system and a religious community, the function of a community supervisor in the schools of the Diocese of Providence is specified as follows:

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[33] Also, unlike parochial schools, establishment and maintenance of colleges are not required by the canon law of the United States.

[34] There appear to be two schools among the 98 in the diocese in which the principal is not a sister (J.A. 74-75). One of these schools, however, is closing this year (J.A. 105).

I. To become well acquainted with the teachers of their communities so as to be able to advise the community superiors on matters of placement and reassignment.

II. To act as liaison between the provincialate and the religious teacher in the school.

III. To cooperate with the superintendent by studying the diocesan school regulations and to encourage the teachers of their community to observe these regulations.

IV. To avoid giving any orders or directions to the teachers of their community that may be in conflict with diocesan regulations or policy regarding curriculum, testing, textbooks, method, or administrative matters.

V. To refer questions concerning school administration beyond the scope of their own authority to the proper diocesan school authorities, namely, the superintendent of schools or the pastor.

3. *Physical Facilities*

The typical parochial school is situated in a building on the same plot as the parish church to which it is appended, although not physically attached to the building (J.A. 76, 104-105). It bears the same name as the church, that of a saint (J.A. 76, 232), which, together with a cross, is on the outside of the building (J.A. 76). A crucifix is to be found in each room as well as a religious statue (J.A. 77, 104). Religious pictures too are to be found throughout the building. In short, "There is no question that when one

visits a school he knows he is visiting a Roman Catholic Parochial School" (J.A. 77).

4. *The Teaching Personnel*

As has been indicated, all but one or two of the principals are nuns or sisters. Of the teachers, about two-thirds are nuns or sisters and the remainder lay teachers. Of the latter, all but from ten to fifteen per cent (i.e., of one-third) are Catholics (J.A. 75-76).

5. *The Student Body*

It may be presumed that the student body in the Rhode Island parochial schools is substantially all Catholic (J.A. 106, 243, 270). The Handbook sets forth the order of preference for admission to the parochial schools, stating (J.A. 223):

> Although wealth should never serve as a criterion for accepting a pupil into a Catholic school, all other things being equal, it would seem fair to give preference to a child whose parents support the parish. Regular use of the budget, rather than the size of the contribution, would appear equitable. *It indicates whether parents regularly attend Mass.* (Emphasis added.)

6. *Religious Practices*

Standard Catholic prayers are recited daily (J.A. 106). The optimum is set forth in the Handbook as follows (J.A. 224):

> 6. Daily Prayers
>
> The following schedule would seem to provide a reasonable sufficiency of daily prayers and to conform to the principle enunciated under Religious Activities (see page 17):

A. Opening of the School Day: *Morning Offering, The Lord's Prayer, Hail Mary,* and the *Apostles' Creed.*

B. After Recess (grades 1-3): The *Memorare*:

C. Noon Dismissal: *The Angelus,* the Doxology: *Glory be to the Father,* etc.

D. Beginning of Afternoon Sessions: *Acts of Faith, Hope, and Charity, the Confiteor.*

E. Dismissal: *The Act of Contrition.*

It is true that, as usually is the case, the optimum is not achieved in practice, and in most cases prayers in the parochial schools in Rhode Island are limited to once or twice daily. But the Handbook was promulgated only five years ago, and this particular provision has never been rescinded or modified, and hence, though not fully adhered to in practice, remains binding.

Besides prayers, religious practices include religious assemblies in observance of Catholic Holy Days, attendance at which is compulsory (J.A. 81-82, 84-85). Here, too, the Handbook sets forth the optimum (presumably in this case adhered to) as follows (J.A. 213):

A. Care should be exercised against unreasonable use of school time for religious activities. A liturgical observance of a Holy Day, Mass on a first Friday, or the Stations of the Cross on the Fridays of Lent would seem reasonable. But to schedule daily or Lenten Mass for student participation during school time is unreasonable and is forbidden.

B. Similarly, there should not be a multiplicity of prayers or lengthy prayers, such as the Rosary, during school time. (For recommended prayers see page 39.)

Other religious practices provided for in the Handbook include attendance of the children at Holy Mass in the event of the death of any member of the clergy of the parish or of any of the teaching sisters in the parish school (J.A. 213). A Mass, as well as a Communion breakfast, is suggested also for graduation (J.A. 226). In addition, retreats and days of recollection form an integral part of the religious program in the Catholic schools. "In the minds of the faculty and students, the retreat should be one of the biggest events of the year" (J.A. 220).

7. *The Parochial School as an Instrument of Recruitment and Training for the Church*

The evidence in this case shows clearly that the Catholic school serves as an important source for the recruitment and training for the Church. Thus, the Handbook makes specific provision for Altar Boys and Choir Boys, as follows (J.A. 227-228):

> 31. Altar Boys
>
> The minimum number of boys required by the liturgy for funeral Masses or other functions during school hours may be excused from class. Careful attention should be directed to the end that:
>
> A. The boys selected are those who can be absent from class with the least harm to their studies.
>
> B. Assignments for serving at funeral Masses are rotated so that the same pupils are not consistently absent from classes.
>
> C. Altar Boy rehearsals may not be held during school hours.

32. Choir Boys

> Choir boys should not be released from school to sing at a funeral Mass. Nor should they engage in rehearsals during school hours except for the period allotted for the teaching of school music.

The Mission Program is another important instrument of recruitment and of propagating and advancing the religious purposes of Catholicism. Its operation is described in part by Father Mullen (J.A. 83) and its objective is set forth as follows in the Handbook (p. 30):

32. Mission Program

> The primary objective of the Mission Program in both the elementary and secondary schools should be the forming of mission minded Catholics. Mission activities will be furthered by teachers, who being mission-minded, integrate mission information with their teaching. This is especially true in the social sciences, as well as religion.

Intervenor-appellants assert that the last sentence (*but only the last sentence*) is not in effect (Brief, p. 72). Nevertheless, it has never been officially rescinded or modified (J.A. 120-121). The Handbook "serves as a guide to the schools in the day-to-day operations of operating the school" and a copy is kept in the principal's office in each school (J.A. 72). In the absence of any official rescission or modification, is it unreasonable to assume that this provision as well as others will be taken as they were intended to be, a binding guide to the operation of the school and the conduct of the teachers?

In any event, deletion of the last sentence means only that special emphasis is not placed on the courses in social sciences and religion, but that all subjects are to receive equal treatment. While the social sciences and religion may present a particularly fertile area in which "mission-minded" teachers can further mission activities through "integr[ating] mission information in their teaching," this can be accomplished also in other subjects, such as in language and literature, and in general communication to the children. (We note here again that nothing in the statute challenged herein forbids mission-minded teachers receiving state salary supplements to integrate mission information with the secular subjects they teach.)

Even more important than the Mission Program as an instrument of recruitment is the Vocations Program (J.A. 83). Its objective and the method of achieving the objective is set forth in the Handbook (J.A. 219) in a provision which defendants concede is still operative and in effect:

> 30. Vocations
>
> Students should be taught to appreciate all vocations: marriage and family life, single life in the world, and religious life. They should be made aware of the immense importance to the Church of vocations to the priesthood and to the religious life. They should understand how great is the need for religious vocations, and the necessity of asking God for the favor of a greater number of vocations. The teacher can help recruit vocations by

A. Inculcating in the pupil a habit of praying for vocations.

B. Giving the pupil a knowledge of the work done by a wide variety of religious communities of men and women.

C. Appreciating his own importance in building correct attitudes toward the priesthood and religious life.

D. Having a professional attitude toward his work and radiating a spirit of happiness and satisfaction.

8. *Religion in Parochial School Teaching*

The evidence in this case shows that the formal teaching of religion as a separate subject is limited to 30 minutes each school day. To assume, however, that this is the sum total of religious education in the Catholic schools is to take a completely unrealistic approach to Catholic education. If that were all there was to it, there would be no reasons for parochial schools; the 30 minutes daily for religious instruction could easily be achieved through a released time program, held constitutional in *Zorach* v. *Clauson,* 343 U.S. 306 (1952), or after school hours.[35]

As recently as 1958, Reverend Joseph H. Fichter, S.J., in an authoritative work on the parochial school system, stated:

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[35] This would entail no additional school time since the parochial school day is one-half hour longer than the minimum school day prescribed by the Rhode Island Compulsory School Attendance Law (J.A. 126). The only inconvenience would be requiring the children to take their religious instruction in a place other than the place where they receive their secular instruction. In view of the millions of dollars this would save the Church, it seems incon-

> It is a commonplace observation that in the parochial school religion permeates the whole curriculum and is not confined to a single half-hour period of the day. Even arithmetic can be used as an instrument of pious thoughts, as in the case of the teacher who gave this problem to her class: "If it takes forty thousand priests and a hundred forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?" [36]

The same idea is expressed in the Handbook (J.A. 212) as follows:

> Religious formation is not confined to formal courses; nor is it restricted to a single subject area. It is achieved through the example of the faculty, the tone of the school, *the manner in which the curriculum is taught,* and religious activities. (Emphasis added.)

This provision reflects the statement in the 1929 Encyclical of Pope Pius XI *On the Christian Education of Youth* that the "only school approved by the Church is one where . . . the Catholic religion permeates the entire atmosphere [and where] all teaching and the whole organization of the school and its teachers, syllabus and textbooks in every branch [is] regulated by the Christian spirit." [37]

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ceivable that this minor inconvenience should stand in the way if parochial schools were no more than public schools with 30 minutes of daily religious instruction added.

[36] J. Fichter, *Parochial Schools: A Sociological Study,* p. 86 (1958).

[37] J. Redden and F. Ryan, *A Catholic Philosophy of Education,* p. 357 (1956). See, also, Address of Bishop Joseph L. Bernardin,

Intervenor-appellants vigorously contend that neither the italicized phrase from the Handbook nor the Encyclical is binding. Assuming that to be true, the fact remains that neither has been officially rescinded or modified (J.A. 120-121). The Handbook itself quotes from the Encyclical (J.A. 204) without the slightest indication that the Encyclical itself any more than the Handbook may be ignored. Even if neither the Handbook nor the Encyclical is binding, either *de jure* or *de facto*, it is still true that in the absence of any official rescission or modification the principals (all but two members of religious orders) and the teachers (two-thirds members of religious orders) will take both seriously and give them effect in the schools which they operate.

The Handbook, it should be remembered, is not an ancient document. It is hardly more than five years old. It is the canon law of the Providence Diocese. It simply cannot be sloughed off as something every parochial school principal or teacher is free to ignore. At the very least, obligatory or not, the Encyclical and the Handbook are authoritative guides to and evidence of the rationale and purpose of parochial school education.[38] Common law rules of estoppel may not be exactly applicable, but it ill behooves the appellants to assert that the fundamental rationale for

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General Secretary of U.S. Catholic Conference to National Catholic Education Association, April 7, 1969 (p. 4): "Catholic educators have always maintained that a Catholic school is not one which teaches religion only during one period each day. Rather the whole atmosphere of the school is to be a Christian one, animated by a community of faith—the children, the teachers and the parents."

[38] This Encyclical is the most authoritative extant document on the nature, purpose and philosophy of Catholic education. There is hardly a book on the subject which is not based in large measure on it. In *Redden* and *Ryan, supra*, note 37, for example, there are no less than 35 direct quotations or citations of it. See also McCluskey, *supra* note 17, pp. 77-96.

the parochial school system is now obsolete and therefore public support of the system through compulsory taxation is now constitutional.

Nothing in the statute nor in the regulations of the parochial schools, as the District Court noted (J.A. 85; Trial Transcript, 3/19/70, pp. 39-40), forbids permeation of secular subjects with religious content. All that is forbidden is that the teacher receiving a salary supplement be the one teaching the formal religion class. Even the regulations formulated by the Department of Education go no further than requiring the teacher to certify that he uses the books used in the public school system (Tr. 3/19/70, p. 39). Can it be constitutional for a state to subsidize the salaries of teachers in church schools who "integrate" all their instruction with religious content but refrain from conducting the formal 30-minute daily course in religion? If the answer to this question is in the affirmative, the Establishment Clause of the First Amendment may just as well have not been written.

9. *The Integrity of Catholic Education*

It is our contention that the child attending Catholic (or any other) schools cannot be divided and Catholic education cannot be compartmentalized. The Catholic school educates the whole child, not part of the time but all of the time. The Handbook recognizes this. It recognizes the vital "influence of a Catholic school environment" (J.A. 215). It recognizes that "[r]eligious formation is not restricted to a single subject area. It is achieved through the example of the faculty, *the tone of the school* • • •" (J.A. 215. Emphasis added).

It is because the Catholic school educates the whole child as a Catholic, because a "Catholic school environ-

ment" is so essential to Catholic education, because "religious formation . . . is achieved through the tone of the school," that the "secular subjects" teacher cannot be torn out of context and viewed in an aseptic vacuum. It is the integrity of Catholic education which makes it so vital to the Catholic religion and the Catholic Church but it is that integrity which forbids governmental financing of its sacred mission. It is because of this integrity that religion is the heart and lifeblood of the Catholic school and that a statute which authorizes the use of tax-raised funds to meet its operating budget cannot but have the purpose and primary effect of advancing religion.

We conclude this part of our brief with a short postscript. Applying the purpose-effect test completely, the District Court found that the Rhode Island statute did not merely advance religion, but inhibited it as well (J.A. 43-45). This might appear paradoxical if not self-contradictory, but it has long been recognized that governmental involvement in religious affairs even when motivated by a desire to aid and support religion inevitably brings harm to it.[39] It is for this reason that this Court has so often stated that governmental abstention from involvement in

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[39] See Madison's Memorial and Remonstrance against the Virginia Assessment bill (330 U.S. at 67):

> 7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstitution, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

religious affairs is not a manifestation of hostility to religion but of benevolent neutrality.[40]

III.

Walz: entanglement.

There is little that we can add to the District Court's unanimous opinion in respect to the invalidity of the challenged statute under the *Walz* test. We find it difficult to see how a contrary result could be reached under that test. With the exception of the divided Michigan court in *Matter of the Legislature's Request,* every court, state or Federal, which since the *Walz* decision considered a statute similar to the one in issue here has declared it unconstitutional under *Walz.*[41] The United States Court of Appeals for the Sixth Circuit has held that even a textbook law may be unconstitutional under the *Walz* test if it goes beyond the narrow provisions of the New York statute upheld in *Allen* and if it requires more governmental involvement in applying statutory safeguards than was present in the New York statute, *supra,* p. 21, footnote 27.

It is therefore hardly surprising that the appellants and the intervenor-appellants herein base their case on *Schempp-*

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[40] *McCollum* v. *Board of Education,* 333 U.S. 203, 211-212 (1948); *Engel* v. *Vitale,* 370 U.S. 421, 433-435 (1962); *Schempp,* 374 U.S. 226; *Walz,* 90 S. Ct. at 1414.

[41] *DiCenso* v. *Robinson; Johnson* v. *Sanders; State ex rel. Chambers* v. *School District No. 10; Seegers* v. *Parker.* While the opinion in the last cited case stated that it was based on the state constitution, it did consider the *Everson, Schempp-Allen,* and *Walz* tests, and reached the conclusion that the challenged statute was unconstitutional under all three.

Allen almost as if *Walz* had never been decided.[42] But *Walz* will not go away, nor can it easily be explained away. The appellant-State of Rhode Island seeks to achieve this by arguing that the statute does not require "a week-to-week or month-to-month surveillance," but only an "annual" one, since "teachers are hired on an annual basis." (Brief, p. 26.) This assertion is obviously predicated on the assumption that nothing more is required of the State than to exact from the teachers an annual promise that they will not teach religious subjects and that there is no obligation on its part to insure compliance with the promise.

Walz certainly does not contemplate such an easy disposition of the surveillance problem. Tax returns are also required only on an annual basis, and the taxpayer affirms that what he says is true. Yet the Court held that

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[42] Appellants' Brief (p. 11), after noting *Walz*, blandly states: "The test or standard that has emerged is three-fold, viz: (1) Is the purpose of the Statute secular? (2) Is the primary effect of the Statute the advancement of religion? (3) Is the primary effect of the Statute the inhibition of religion?"

The Brief of intervenor-appellants devotes 33 pages to *Schempp-Allen* and only six to *Walz*. It almost suggests that *Walz* is really *Schempp-Allen* in disguise. It asserts that the District Court was "inaccurate" in observing that "neither the majority nor concurring opinions [in *Walz*] rely on the *Schempp* formulation," since the majority did examine both the purpose and effect of exempting church property from taxation. Brief, p. 61, fn. 61. But the effect considered in *Walz* is the effect on *entanglement*, which is something quite different from effect on *advancement of religion* upon which appellants rely so heavily. The footnote continues that while it "is true that the Court in *Walz* did not quote the *Schempp* formulation of the purpose and primary effect test . . . that formulation appears verbatim in *Board of Education* v. *Allen*, a decision which the majority in *Walz* cited with obvious approval." By that reasoning the *Everson* test is alive and well, for, without exception, every decision of this Court since *Everson* involving aid to religion has cited *Everson*. See discussion of the *Everson* test in the briefs in *Tilton* and *Lemon* referred to *supra*, p. 7. (*Everson* is the only decision cited in *Engel* v. *Vitale*, 370 U.S. 421, 428 (1962).)

requiring churches to pay taxes would result in substantial entanglement and surveillance. Moreover, aside from the statutory promise, the First Amendment, as all parties hereto concede, requires that at the very least those teachers whose salaries are paid in part by the state must refrain from introducing religion into the subjects which they do teach. The demands of the Rhode Island constitution may be satisfied by an annual written promise; but the fundamental freedoms of the United States Constitution demand considerably more.

What, in effect, appellants are saying is that the Establishment Clause's barrier against continuing surveillance can be disposed of by the simple device of dispensing with surveillance. Measured by that standard, we cannot offhand think of any governmental aid to religion or religious schools—and certainly not outright, unqualified subsidies—which would violate that Clause.

Appellants and intervenor-appellants both stress that the state is already heavily involved in the operations of parochial schools so what harm can a little more involvement do? They point to laws pertaining to compulsory attendance and curriculum and to health, safety, buses and lunches. (Appellants' Brief, p. 26; Intervenor-appellants' Brief, pp. 58-59.) Intervenor-appellants go so far as to assert that present Rhode Island law "gives local school committees a life-or-death power over all nonpublic schools." (Brief, p. 58.)

In response to the last statement, we presume to borrow (as the Court did in *Walz*) from Mr. Justice Holmes in adding, "Not while this Court sits." *Pierce* v. *Society of Sisters, supra,* holds that a state may not directly pass a

death sentence upon nonpublic schools. *Farrington* v. *Tokushige,* 273 U.S. 284 (1927) holds that it cannot achieve the same result by excessive regulation of their operations.

There is a vast difference between the surveillance contemplated by the statute herein and that required to assure that the ceilings in nonpublic schools will not fall down upon the children or that the buildings have sufficient exits for use in case of fire. If the latter surveillance justifies governmental subsidies to religious schools, so too would it justify subsidies to churches and synagogues.

Even statutory requirements regarding pupil attendance and curriculum stand on a different footing. The state has a constitutional right to compel parents to provide their children with a minimum secular education.[43] Under *Pierce* v. *Society of Sisters,* parents have the constitutional right to provide the education through institutions other than the public schools. But the right of the state, in protecting the children's welfare to assure that the children receive a minimum secular education, is superior to the parents' right to send the children to sectarian schools or the right of the church to operate schools. Hence, the state is empowered to condition the rights of both the parents and the schools to the extent necessary to assure the protection of the children's welfare. Cf. *Prince* v. *Massachusetts,* 321 U.S. 158 (1944). Thus, for example, the state may require that the children in the nonpublic schools take state administered tests or that the teachers be holders of state licenses. But this is a far cry from holding that the state may pay the salaries of those

[43] *People* v. *Donner,* 199 Misc. (N.Y.) 643, 278 App. Div. 705, 302 N.Y. 857, appeal dismissed, 342 U.S. 884 (1951); *State* v. *Garber,* 197 Kan. 567, appeal dismissed, cert. denied, 389 U.S. 51 (1967).

teachers any more than it may pay for the physical maintenance or construction of the school so as to assure the health and safety of the children.

Above all, the surveillance contemplated and required both by the Rhode Island statute and the Establishment Clause is of a critically different species from that necessary under the laws referred to by appellants and listed in the appendix to the intervenor-appellants' brief. None of these laws require or empower the state's agents to pass judgment on what teaching is secular and what religious. It is just this kind of censorship that the Court adjudged violative of the First Amendment in *Cantwell* v. *Connecticut,* 310 U.S. 296, 305 (1940).[44] It is to avoid such censorship of religion by a governmental official which, as the Court in *Cantwell* v. *Connecticut* noted may actually empower him to pass a life or death sentence, that underlies the Court's decisions against governmental intervention in religious matters. See, *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679 (1872); *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952); *Presbyterian Church in the United States, et al.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, et al.,* 393 U.S. 440 (1969). See also *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953).

Intervenor-appellants assert (Brief, p. 38) that *Walz* forbids only excessive governmental involvement with religion and that this would be present only "if the administrative controls placed on religiously affiliated schools

[44] Of course, *McCollum, Engel* and *Schempp* require such surveillance in the public schools, but the Establishment Clause does not forbid the state from entanglement with and surveillance over its own institutions. Cf. *Farrington* v. *Tokushige, supra,* wherein the Court pointed out that the overly-regulated schools "receive no aid from public funds." 273 U.S. at 291.

were broader than necessary to assure a purely secular use of public funds." Nothing in *Walz* supports such an interpretation of the entanglement test. On the contrary, the Court there, in declining the invitation to base its decision on the fact that churches perform secular (social) services as well as religious ones, said (90 S. Ct. at 1414):

> We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others—family counseling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need. As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. *To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.* (Emphasis added.)

The Salary Supplements Act thrusts the State of Rhode Island directly into the business of operating parochial schools. It makes the State co-employer with the parish of teachers in the parochial schools, and in that capacity

as well as by reason of the principle established in *McCollum* that publicly supported teachers may not teach religion, it must undertake continuing supervision of the teachers and surveillance over them in their discharge of their duties. If this does not constitute excessive entanglement and involvement in religious affairs, we cannot imagine what would.

IV.

Religious means and secular ends.

In his concurring opinion in *Schempp,* Mr. Justice Brennan said (374 U.S. at 265):

> • • • [T]he teaching of both Torcaso and the Sunday Law Cases is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.

It was on this principle that he based his concurrence in *Walz,* and it is a principle that we believe is fully consistent with the history and purpose of the Establishment Clause.

We have already quoted (*supra,* p. 14) from the preamble to the Virginia Bill Establishing a Provision for Teachers of the Christian Religion, setting forth exclusively secular ends for a religious tax law. Madison's response to this in his *Memorial and Remonstrance* was that governmental use of "Religion as an engine of Civil Policy

. . . [is] an unhallowed perversion of the means of salvation." [45]

History from ancient times to the present validates Madison's judgment. The Bible (1 Kings 12:26) relates that after Jeroboam led the northern tribes in revolt against the Davidic dynasty, he

> • • • said in his heart, Now shall the kingdom return to the house of David: if this people go up to do sacrifice in the house of the Lord at Jerusalem, then shall the heart of this people turn again unto their lord, even unto Rehoboam king of Judah, and they shall kill me, and go again to Rehoboam king of Judah. Whereupon the king took counsel and made two calves of gold, and said unto them, It is too much for you to go up to Jerusalem: behold thy gods, O Israel, which brought you up out of the land of Egypt. And he set the one in Bethel, and the other put he in Dan. And this thing became a sin: for the people went to worship before the one, even unto Dan. • • •

Many other similar instances in the history of religion, from Constantine's establishment of Christianity as the official state religion in order to unify the Roman empire to contemporary utilization of religion to maintain an oppressive state as in the Soviet Union[46] testify to the validity of the judgment of Jefferson, Madison and other founders of our republic that religion is corrupted when it allows

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[45] *Everson* Appendix, 330 U.S. at 67.

[46] Cf. *Kedroff* v. *St. Nicholas Cathedral, supra.* See M. Spinke, *The Church in Soviet Russia,* passim (1956); J. Gsovski, ed., *Church and State Behind the Iron Curtain* (1955).

itself to be used for governmental purposes. Even where religion is not corrupted, it is substantially weakened in carrying out its sacred mission when it relies on governmental support and financing.[47] It is for these reasons that the great statesman and jurist, Jeremiah S. Black, stated that the fathers of our Constitution "built up a wall of complete and perfect partition" between church and state in order that "one should never be used as an engine for the purposes of the other."[48] Governmental abstention from financing as from taxing is not an expression of hostility, but truly of benevolent neutrality.

To hold that government may as a matter of convenience rather than overriding necessity employ religion or religious institutions as a means to effect secular ends which are properly within governmental competence would go far toward making the First Amendment meaningless. Practically every defense of religious instruction in public schools is predicated on the not unreasonable assertion that religious education leads to morality and good citizenship. If religion could be used to achieve the obviously secular goals of morality and good citizenship, it would follow not only that religion could constitutionally be taught in the public schools, but also that tax-raised funds could be used to finance religion and religious education.

Moreover, the government could reasonably find that some religions, such as Protestantism, Catholicism, and Judaism, are more likely to inculcate good citizenship than

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[47] The District Court noted that "some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy." J.A. 44.

[48] J. S. Black, *Essays and Speeches*, p. 53 (1885).

others (Jehovah's Witnesses or the Black Muslims, for example) and, therefore, could aid the former and not the latter. This is a conclusion we doubt this Court would accept today, any more than it accepted in *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) the use of a religious test to assure more honest notaries or other civil servants.

Nothing in the record of this case presents any demonstration, much less "the clearest demonstration," that the secular purpose of Rhode Island in providing for all its children a satisfactory secular education could not be served by expanding the facilities and personnel of its public schools to accommodate those children seeking admission. The nonpublic school authorities assert that their school systems are in dire financial straits and in the absence of governmental funds may be required to curtail their activities if not discontinue them. There is no way to challenge this assertion since, unlike public officials, religious groups are not required to nor do they generally disclose the extent of their financial resources or how they allocate them among the various religious missions they carry on.

But even if the claim of financial straits is fully accepted,[49] and even if it be assumed that in the absence of

[49] It is hardly startling news that the public schools too are in dire financial straits. The New York *Times* of January 11, 1971 (p. 46), for example, reports that the New York City public schools are unable to provide breakfast for the needy children attending them because, while the Federal and state governments each are making available twenty cents per child for this purpose, the New York City Board of Education does not have the resources to furnish the twenty cents per child matching funds that are required. Moreover, not all parochial school systems face financial crises. The Jewish parochial schools, for example, have in the past 25 years increased from 30 in three cities to 425 in 31 states and

governmental support the parochial schools will be required to curtail or even discontinue operations, it does not clearly follow that the added expense to the state in educating the additional children in the public schools will be more than supporting the nonpublic schools they now attend. The District Court noted that "sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities." (J.A. 41.)[50]

As we have indicated (*supra*, pp. 17-20), the history of the demands of nonpublic schools for tax-raised funds points clearly towards complete public financing of nonpublic

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plans are under way to expand the system during the next decade by adding 125 elementary and 75 high schools. New York *Times*, November 14, 1970, p. 33. See also, J. M. Swomley, "Are Parochial Schools Imperiled," *Christian Century*, January 13, 1971, p. 40.

[50] Counsel for the intervenor-appellants recognized and acknowledged this, as appears from the following colloquy (Tr. 3/19/70, p. 35):

> Judge Pettine: Yes, I think that's what Judge Coffin is saying. If you give 15%, why can't you give 100% on the theory you propounded must follow. Perhaps if you go that far, why can't you subsidize the building?
>
> Mr. Collins: I do go that far, then.

While we contend that this is patently unconstitutional, certainly under the *Everson* principle and no less so under the purpose-effect test, counsel for the intervenor-appellants take the position that it is constitutional under the latter test, as is evidenced by the following colloquy (Tr. 3/19/70, pp. 37-38):

> Judge Coffin: If I may, I'd like to follow up and ask you a conclusive question. Supposing we have this sort of a building and it's subsidized, that is, 100% support of the teacher salaries, all of the teachers teaching secular subjects with state subsidy for the maintenance of the building and what not, and in that situation, I take it, you would also say that the primary effect was not to advance any particular religion?
>
> Mr. Collins: Yes, Your Honor. • • •

schools.[51] The supplanting of the innumerable rural "little red school houses" by modern well-equipped and well-staffed consolidated school districts, and the tragic history of the dual school system in the South, show that a unitary school system is likely to provide better education at a lower cost than a host of independent, parallel and competing systems.

Even if this is not so; even if it would cost more to educate parochial school children in the public schools than to finance their education in parochial schools, it does not follow that the test suggested by Mr. Justice Brennan has been satisfied. Democracy is not necessarily the cheapest form of government; and our Bill of Rights secures liberties which can be quite costly when measured in terms of dollars. It would be, for example, far more economical to forbid an unpopular speaker to speak than to provide him with the costly police protection which enables him to speak. (Cf. *Kunz* v. *New York,* 340 U.S. 290 (1951).)

All the fundamental freedoms of the First Amendment, including the freedom from established churches, are precious. It was the judgment of those who wrote the amendment and the generation of Americans which put it into our Constitution, that they were well worth the cost. We believe that judgment is no less valid today.

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[51] The initial expenditure of funds for nonpublic schools under the statute in *Lemon* was $6.4 million for the 1969-70 school year. The estimated cost for the 1971-72 school year is $36.1 million, according to the Pennsylvania State Department of Education. *Religious News Service,* January 20, 1971.

V.

The test of time and space.

In *Walz* both the Court's opinion by the Chief Justice (90 S. Ct. at 1415) and the concurring opinion of Mr. Justice Brennan (at 1418) stressed that tax exemption for churches went back to the earliest days of the Republic; both quoted the comment of Mr. Justice Holmes in *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921) that "a page of history is worth a volume of logic." Both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of its constitutionality.

In the present case, however, history and practice point in exactly the opposite direction. From the disestablishment of churches at the end of the 18th and the beginning of the 19th centuries until the past few years neither the Federal government nor any state has directly subsidized the operations of sectarian educational instructions.[52] Just as the constitution or laws of every state in the Union authorize tax exemption so do they universally forbid direct subsidization. See Note, *Catholic Schools and Public Money,* 50 Yale L.J. 917 (1941): *Horace Mann League* v. *Board of Public Works, supra;* C. Zollman, *American Church Law,* 78-80 (1933).

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[52] *Quick Bear* v. *Leupp,* 210 U.S. 50 (1908) is no exception. The funds there used to finance the operations of Indian mission schools belonged to the Indians, and not to the Federal Government which held legal title merely as trustee for the Indian tribes at whose direction the funds were allocated. It can hardly be contended that the First Amendment allows governmental funds to be unqualifiedly appropriated to mission schools.

Other than *Lemon* and the divided opinion of the Michigan Supreme Court referred to above (p. 12), we know of no case in a court in the United States, Federal or state, in which a law providing for payment of tax-raised funds to a church to subsidize its sectarian school operations has been upheld as constitutional. There have been, as we have indicated (*supra,* p. 18) a number of cases wherein parochial schools experiencing financial difficulties were purportedly transferred to the public school system under a plan whereby the parochial school premises were rented to the public school authorities and the teachers, usually nuns and sisters, were employed *en masse* by them as public school teachers. With but one exception,[53] the arrangement was held unconstitutional in every case and even in the exceptional case constitutionality was based on a factual finding that the school was no longer a parochial school but had in fact become incorporated into the public school system even though the nuns turned over their public money salary checks to the religious order to which they belonged.

The challenged statute, we submit, cannot withstand the test of time and space.

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[53] *State ex rel. Johnson* v. *Boyd, supra.*

VI.

Establishment, racial segregation and the balancing test.

Paragraph 5 of the complaint in *Lemon* alleges the following:

> 5. Non-public schools, including the defendant schools are, de facto, racially segregated, either by religious requirement, design, tradition, policy, quota, cost, or residential pattern, and the aid rendered to such schools will perpetuate and promote such racial segregation in that said subsidy will further enable private schools to increase their enrollment, which increase in enrollment will be exclusively or almost exclusively white which, in turn, will increase the percentage of Negro enrollment in the public schools, thus aggravating said de facto segregation and, in turn, strengthening the preference of many white parents to enroll their children in nonpublic schools (by reason of the racial prejudice of said parents or because the public schools will necessarily become inferior by reason of obtaining a smaller percentage of the total funds which the community is prepared to commit for education), which will, in turn, generate political pressures for even greater tax aid to private schools, justified by their increased enrollment, with the ultimate result of promoting two school systems in the Eastern District of Pennsylvania—a public school system predominantly black, poor and inferior, and a non-public school system predominantly white, affluent and superior.

The District Court held that this paragraph sought to assert a claim under the Equal Protection Clause of the Fourteenth Amendment and since none of the plaintiffs was the parent of a Negro child who had been denied admittance to any nonpublic school, they did not have standing to assert the claim.

The complaint in *Johnson* v. *Sanders* contained a similar allegation, asserting that if the statute there challenged were allowed to stand it would have "the ultimate result of promoting two school systems in Connecticut, especially in the larger cities—a public school system predominantly black, poor, and inadequate, and a non-public school system predominantly white, affluent, and superior." Plaintiffs submitted substantial statistical evidence to support this allegation, but the District Court there too held that the plaintiffs had no standing to raise the Equal Protection issue. Nevertheless, it went out of its way to state that "this disposition of the question, which avoids the merits, should not be construed to imply that, assuming a qualified plaintiff, this court regards the issue itself as frivolous or without substance." —— F. Supp. —— at ——; Slip Opinion, pp. 24-25.

Whether the District Courts were correct in their disposition of the issue, in view of the expanded concept of standing expressed in *Flast* v. *Cohen,* 392 U.S. 83 (1968) and *Association of Data Processing Service Organizations* v. *Camp,* 90 S. Ct. 827 (1970), is not before the Court in this appeal, though it is in the appeal in *Lemon.* We did not raise the Equal Protection claim in the present case but relied exclusively on the First Amendment. Notwithstanding that fact, and irrespective of how the standing question

is decided in *Lemon*, we believe that the relationship of racial segregation to governmental support of nonpublic schools is relevant to the determination of the Establishment issue as raised in this appeal for the following reason.

It is our position that the Establishment Clause must be interpreted, as it was in *Everson*, as setting up an absolute prohibition upon governmental subsidization of the operations of parochial schools. There are, however, dicta in *Allen*—dicta because the Court there stressed that no subsidization was involved—which might be construed as indicating that a balancing test is appropriate. In *Allen*, the Court said (392 U.S. at 247-248):

> Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

But if balancing is the test, the balancing must be judged ultimately by the courts, not the legislature, at least where the First Amendment is concerned. In *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), the Court in invalidating a state statute limiting the number of cars on trains held that the state's interest in insuring the safety of its citizens must be weighed against the national interest in free-flowing interstate commerce. If there is a hierarchy of constitutional values in our system of democracy, certainly the fundamental freedoms of the First Amendment occupy a status not lower than that of interstate commerce, and laws impairing the integrity of the Establishment Clause should be subject to judicial scrutiny no less searching than that imposed on laws threatening the integrity of the commerce clause.

If a law which a state legislature reasonably found to be necessary for the protection of human life can be invalidated because the Court deems the state's interest therein to be outweighed by the constitutional interest in uninhibited interstate commerce, so too can a law deemed by the legislature to be necessary to insure adequate secular education for children attending nonpublic schools be invalidated because it is outweighed by the constitutional interest in a racially integrated society. Indeed, the latter case is stronger, for the State of Arizona had no alternative means of protecting human life whereas, as the District Court in *Johnson* v. *Sanders* stated in denying a motion to stay its judgment, "children who cannot be accepted in denominational private schools will not be bereft of education as the public school facilities remain open to them."

If balancing is the test, balancing requires that both sides of the scale be weighed. In *Allen*, the Court paid fitting

tribute to the role played by nonpublic schools, including parochial schools, "in raising national levels of knowledge, competence and experience" and in providing for their pupils an acceptable secular education. But this is not the whole picture; there is a darker side which too must be considered and given due weight. There was no record in *Allen;* the Court's assessment of the role played by nonpublic schools in educating children was obviously based on judicial notice. Judicial notice, however, can show as well that nonpublic schools, including parochial schools, are playing a substantial though unintended role in the preservation of racial segregation.

It is a matter of common knowledge that judicial pressure toward racial integration in the public schools of the South has led to a mushrooming of newly-established private schools and "academies," [54] some of which are church related.[55] Private schools, especially parochial schools, are comparatively rare in most parts of the South, and hence the necessity for establishing new ones. In the North, and in some parts of the South as well (e.g., Louisiana), there already exists a well-established network of nonpublic schools, and the need to create new ones to avoid racial integration is not so urgent.

The nonpublic school community is a community of white, middle and upper class children. This is a fact substantiated by every study that has been made. According to the

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[54] See *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 223 (1964).

[55] The New York *Times* of September 5, 1970 reports on page 9 the establishment of the Woodland Hills Academy in Mississippi, connected with the Woodland Hills Baptist Church, a denomination which has not previously been known to operate parochial schools.

Census statistics for 1960-62, 14.2% of the children attending public schools were non-white; in nonpublic schools, the percentage was 3.5.[56] In the urban areas particularly, the private school is often a white oasis surrounded by a nonwhite desert. Very few children belonging to ethnic minority groups and very few children of poor families attend private schools; their universe of education is the public school system. This is shown by the authoritative study made by the United States Commission on Civil Rights, reported in Racial Isolation in the Public Schools, Vol. 1 (1967) at pp. 38-39 (footnotes omitted):

Nonpublic Schools

> Private and parochial school enrollment also is an important factor in the increasing concentration of Negroes in city school systems. Nonpublic school enrollment constitutes a major segment of the Nation's elementary and secondary school population. Nationally, about one-sixth of the total 1960 school enrollment (Grades 1 to 12) was in private schools. In metropolitan areas the proportion is slightly higher, and divided unevenly between city and suburb. Nearly one-third more elementary school students in the cities attend nonpublic schools than in the suburbs. Almost all of them are white. In the larger metropolitan areas the trend is even more pronounced. As Table 8 shows, a much higher proportion of white city students than white suburban students attend private and parochial

[56] Statistical Abstract of the United States (1963) Table No. 148; U.S. Bureau of the Census, 1960 Census of Population, PC(2)-5A, Table A-1 at 129 (1964).

elementary schools. Nonwhites in these metropolitan areas, whether in cities or suburbs, attend public schools almost exclusively.

TABLE 8.—*Proportion of total elementary students, by race, in public and nonpublic schools, for 15 large metropolitan areas, 1960*

	Central cities		Suburbs	
	White	Nonwhite	White	Nonwhite
Public	61	94	75	97
Nonpublic	39	6	24	3

Source: Taueber, *Tables on School Enrollment in Selected Metropolitan Areas*, prepared for the Commission.

Thus, nonpublic schools absorb a disproportionately large segment of white school-age population in central cities, particularly in the larger ones. This poses serious problems for city school systems. In St. Louis, for example, 40 percent of the total white elementary school population attended nonpublic schools in 1965; in Boston, 41 percent; in Philadelphia, more than 60 percent.

In Detroit, according to a New York *Times* report (December 19, 1970, p. 16), two-thirds of the children in the public schools are black. In Philadelphia, more white children attend parochial schools than public schools. M. Friedman and P. Binzen, "Politics and Parochiaid," *New Republic,* January 23, 1971, p. 13. In Connecticut a compilation by the Catholic Archdiocese of Hartford for the year 1968-69 showed that 2.6% of the state's parochial school population was black, and 1.2% Spanish speaking

(Puerto Rican).[57] The comparative figures for the public schools were respectively 8.3% and 2.8%. The disparity in respect to black pupils is of course explainable by the fact that only a small percentage of black Americans are Catholic, but this does not alter the fact that the parochial schools are an institution of white Americans. That nonpublic schools are also an institution of upper and middle class Americans appears from a comparison of the percentages of poor children, i.e., those receiving benefits under the Federal Aid to Families with Dependent Children program (AFDC) in public and nonpublic schools in Connecticut as of 1970. This shows that while 6.3% of the children attending the public schools in the State are AFDC children, only 1.4% of the children in nonpublic schools are of that category.

This disparity between the percentages of white and nonwhite children in public and nonpublic schools is not merely continuing but is growing steadily greater. A report by the Connecticut State Department of Education issued in April, 1970, showed that in September, 1967, 7.8% of the enrollment in the public schools of that state was black; one year later, it had risen to 8.3%; one year after that, in October, 1969, it had again risen and was now 8.6%.

The explanation for this trend is that an increasing number of parents are withdrawing their children from public schools and sending them to private schools, including parochial schools, not so that they may better pursue God but more effectively avoid racial integration. This development sorely troubles most religious leaders, in-

[57] The statistics for Connecticut are part of the Record in *Johnson* v. *Sanders*.

cluding those in Rhode Island, and they are sincerely and diligently but nevertheless vainly seeking means to counteract it. It troubles public educators as well. The New York *Times* of December 7, 1969 reported that Dr. Nathan Brown, Acting Superintendent of Schools in New York City, in an address delivered at a Jewish theological seminary, called the attention of Jewish leaders to this problem. "I deplore," he said, "any action on the part of Jewish parents who escape the city school system for the sole purpose of avoiding racially integrated schools." He referred to what he called the increasing Jewish enrollment in religious and "pseudo-religious" schools in the light of social, ethnic and class conflicts arising from school reorganization, and expressed the fear that alienation of the Jewish middle class from the system could result in a city of "ghettos surrounded by police protecting one group from another."

In Connecticut, in October of 1969, the United States Department of Justice brought suit against the Department of Education of Waterbury, charging in its complaint among other things that "white children who reside in public school districts where substantial numbers of Negro and Puerto Rican children also reside have been transported by the City of Waterbury from such public school districts to all white or predominantly white independent non-public schools, wherein to a substantial extent, facilities of public schools which commonly are located adjacent to or near the respective independent non-public schools are shared. This practice has resulted in certain public elementary schools becoming and remaining predominantly Negro and Puerto Rican." [58]

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[58] Complaint in *United States* v. *Board of Education of Waterbury*, U.S.D.C. for Connecticut, Civil Action No. 13465.

Following this Court's decision in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969), ordering immediate integration in the public schools in the South, white Catholic schools in Louisiana were besieged by new white applicants seeking to escape the public schools. The Archdiocese of New Orleans and the Diocese of Baton Rouge promulgated special guidelines to prevent parochial schools from becoming havens for fleeing whites. These guidelines have been only partially successful.[59] Following the pattern in the public schools, the Catholic system maintains separate schools for white and black children. In Lafayette Diocese the Academy of the Immaculate Conception, a white school, enjoyed a 22% increase in enrollment in 1969-1970. In June, 1970, parents of children in the black school brought a suit in the United States District Court for the Western District of Louisiana[60] seeking judgment requiring termination of the dual system on the theory that the receipt of such financial aid from the state as tax exemption, free textbooks, etc., constituted a nexus between the state and the Catholic school system sufficient to render the Fourteenth Amendment applicable.

The leadership role of the National Association for the Advancement of Colored People (NAACP) in the Negro's struggle for equality is a matter of common knowledge; it has been recognized in at least two decisions of this

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[59] Guillory, "Louisiana Desegregation—And Catholic Schools," *America*, Sept. 5, 1970, p. 119; Cozzi, "Catholic Segregation: It's Almost 1954," *Commonweal*, December 25, 1970, p. 317.

[60] *Auzenne* v. *School Board of the Roman Catholic Diocese of Lafayette*, Louisiana, Civ. Action No. 15,804.

Court: *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958); *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963). It is also a matter of common knowledge that the NAACP has traditionally kept itself aloof from controversies which did not directly affect the cause of racial equality. It is therefore of great significance that state branches of the NAACP are now not merely participating in the sponsorship of suits challenging governmental financing of parochial schools but are actually joining such suits as parties plaintiff. The Pennsylvania NAACP is a party plaintiff in *Lemon;* the Connecticut NAACP is a plaintiff in *Johnson* v. *Sanders;* the Michigan NAACP is a party plaintiff in *Citizens to Advance Public Education* v. *Porter,* Circuit Court for County of Ingham, Michigan, challenging assignment of public school teachers to serve in parochial schools; the New Jersey NAACP is a party plaintiff in *American Civil Liberties Union* v. *Marburger,* United States District Court for the District of New Jersey, Civ. No. 1727-70, challenging a purchase of secular services law.

Nor is NAACP activity limited to the litigation front; it is no less active in opposing legislation seeking to provide public financial aid to nonpublic schools. In Michigan, for example, the state NAACP played a leadership role in seeking to defeat enactment of a bill providing for purchase of secular services and in seeking adoption of a constitutional amendment forbidding all financial aid to parochial schools. (See full page advertisement in the Michigan *Chronicle,* January 17, 1970, p. 15.) In Delaware, the state NAACP publicly opposed enactment of an aid to parochial school measure on the ground that many white parents send their children to private schools to avoid in-

tegrated education. *Wilmington Journal,* December 18, 1970. In Maryland, the Black community took the same position for the same reasons. See Testimony of Mrs. Enolia McMillan, president of the Baltimore Branch of N.A.A.C.P., at Hearings of Committee on Ways and Means, Maryland General Assembly, March 3, 1970; Editorial, "State Education Aid," *Baltimore Afro-American,* February 21, 1970.

It was not the purpose of those who founded America's parochial school system that it should become a place of refuge for whites fleeing Negroes. Nor is this the purpose of the religious leaders who strive in a time of mounting educational costs to maintain that system. And that is also not the purpose of the legislatures which appropriate public funds for the support of parochial schools so that those schools may continue to exist. It is, however, the purpose of many parents, North and South, who send their children to nonpublic schools. And it is an effect, and increasingly a primary effect of laws which appropriate tax-raised funds for the support of nonpublic schools.

The effect may well be even more serious. It is not too much to suggest that the preservation of the equalitarian, multiracial and multireligious public school system envisioned by its founders rests upon the outcome of the intense struggle for governmental financing of nonpublic schools. To the extent that the public schools, particularly in urban areas, remain multiracial, the explanation lies in the fact that almost all the white children attending them are members of middle income families who simply cannot afford to pay the tuition and other expenses in nonpublic schools. These middle income white children are the flesh and blood of a multiracial public school system. Should

the time come when through increasing governmental support of nonpublic schools it will be economically feasible for white middle income parents to send their children to nonpublic schools, the public school system will become the modern day equivalent of the pre-public education charity school—an institution for society's rejects most of whom will be members of racial minorities. We will then end up with the two school systems—separate and unequal.

CONCLUSION

For the reasons set forth herein, the unanimous decision of the court below should be affirmed.

Respectfully submitted,

LEO PFEFFER
15 East 84th Street
New York, N. Y. 10028

MILTON STANZLER
626 Industrial Bank Building
Providence, R. I. 02903

HAROLD E. ADAMS, JR.
WILLIAM J. SHEEHAN
ALLAN M. SHINE
RICHARD W. ZACKS

Attorneys for Appellees

February, 1971.